No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC. ET AL.,

Respondents.

On Writ of Certiorari
to the Supreme Court of South Dakota

BRIEF FOR ETSY, INC. AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Etsy, Inc. provides a leading online marketplace used by "microbusinesses"—businesses in which the sole employee is also the owner, or that have just a handful, if any, more employees—to sell handmade, craft, and vintage products over the internet. Etsy does not "sell" any products or hold inventory. Its business is providing an online platform for microbusinesses to sell their goods. A typical Etsy seller is a female entrepreneur working out of her home to supplement her household's income. In 2017, 1.9 million such microentrepreneurs used Etsy to earn a total of $3.25 billion, including from sales across state and country lines.

Etsy is concerned that if the Court's long-standing precedent in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), were to be overturned, or if *Quill* were to be construed to not reach online sales, the impact on the small businesses selling on Etsy would be devastating. The typical single-person business selling craft products on Etsy to earn supplemental income lacks the substantial resources necessary to ensure compliance with the sales tax laws of potentially thousands of jurisdictions. Indeed, these sellers already identify existing administrative burdens from running a small business—*e.g.*, local business licensing requirements and their own State's tax collection and reporting obligations—as one of their most significant barriers to growth. Survey data suggest that a significant percentage of Etsy sellers would stop selling into the interstate market if forced to learn and comply with the sales tax regimes of additional jurisdictions. That is precisely the fragmentation of the interstate market

that the dormant Commerce Clause, and the holding of *Quill*, were intended to avoid.[1]

SUMMARY OF ARGUMENT

The largest online retailers, including Amazon, already are collecting sales tax in every jurisdiction into which they sell; these retailers tend to have either storefronts or fulfillment centers throughout the country and thus *Quill* does not excuse them from sales tax collection obligations. The effect of *Quill's* abrogation would be felt most by smaller businesses, including the microbusinesses selling on Etsy, for which the administrative burdens of running a business already pose a barrier to growth. Many microbusinesses would stop selling into the interstate market altogether if they were required to calculate and collect sales taxes in States in which they lack a physical presence. *Infra* at 11.

South Dakota asserts that *Quill's* bright-line rule no longer is necessary to protect small businesses from crippling compliance obligations because modern software makes it simple to accurately calculate sales taxes nationwide. In an era accustomed to technological leaps and marvels this may sound plausible, but it is a chimera. No piece of software code can accurately account for how thousands of tax codes (with inconsistent rules, jurisdiction to jurisdiction, that frequently change) apply to tens of thousands of products, includ-

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[1] All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

ing the many unique creative products sold through Etsy. *Infra* at 13-19.

South Dakota also argues that the dormant Commerce Clause should not prevent enforcement of its particular law requiring out-of-state businesses to collect sales taxes, emphasizing that it carves out businesses that do not sell much into South Dakota. But that is not truly accurate. While many out-of-state microbusinesses will not sell $100,000 of goods into a particular foreign State, it is reasonably likely that many would engage in more than 200 transactions—particularly for affordable, low-cost craft goods. And South Dakota has proposed no limiting principle that would prevent it or another State from introducing stingier exemptions in the future. Abandoning *Quill's* bright-line rule on the basis that South Dakota's particular exemptions are reasonable will lead to endless litigation over variants on the exemption theme. *Infra* at 26.

This Court should do what it did in *Quill*—leave the bright-line physical-presence rule intact and allow *Congress* to decide whether, and how, to allow States to require out-of-state businesses to collect sales taxes. Since *Quill*, Congress has taken steps to craft a solution for interjurisdictional sales taxation that balances the concerns of all stakeholders—States and small out-of-state businesses alike. There is no reason for this Court to preempt Congress and abandon *Quill* now, upending the reliance interests of millions of small businesses. *Infra* at 27-29.

ARGUMENT

There are more than 10,000 taxing jurisdictions in the United States. Forty-five States, the District of Co-

lumbia, and thousands of counties, cities, towns, and other political subdivisions each have the power to tax the sale of goods and services. These jurisdictions can set their own sales tax rates, their own definitions of the sales tax base, and their own classifications for goods and services that govern the rate paid or exemption from tax. These jurisdictions also may exempt (or not) various categories of purchasers from paying sales tax at all, may make application of the sales tax hinge on the use to which a product will be put, and may declare unplanned sales tax "holidays" to spur business. Mastering the sales tax laws of even a single jurisdiction can be difficult, particularly for the millions of sole proprietorships and other very small businesses—"microbusinesses"—that use marketplace websites such as Etsy to reach their customers.[2] For microbusinesses to master the sales tax laws of *all* jurisdictions from which a customer might place an order over the internet, in order to ensure compliance with the sales tax collection requirements of all those jurisdictions, would be impossible.

This Court had such compliance concerns in mind when it decided *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). *Quill* reaffirmed a bright-line rule under which a seller only is responsible for collecting sales taxes in jurisdictions in which it has a physical presence. The rule was deemed necessary because a business cannot realistically be expected to manage the "virtual welter of complicated obligations" that nation-

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[2] According to the Small Business Administration, a microbusiness is a business with one to nine employees. Brian Headd, U.S. Small Bus. Admin., Office of Advocacy, *The Role of Microbusinesses in the Economy* (Feb. 2015), https://www.sba.gov/sites/default/files/Microbusinesses_in_the_Economy.pdf.

wide sales tax exposure would impose. *Id.* at 303, 313 & n.6 (quoting *Nat'l Bellas Hess, Inc. v. Dep't of Rev. of Ill.*, 386 U.S. 753, 759-60 (1967)). While South Dakota urges that *Quill* has been obviated by changes in technology and the marketplace, each of its arguments is factually flawed. The Court should reaffirm *Quill* to avoid placing insurmountable compliance barriers in front of businesses, particularly microbusinesses, seeking to participate in the interstate economy.

I. Microbusinesses Will Suffer The Greatest Adverse Effects Of Abandoning The *Quill* Rule.

To read South Dakota's brief, one would think that this case pits exclusively small, local in-state retailers on the one side, against exclusively large, online giants such as Amazon on the other. *E.g.*, Pet. Br. 1 (asserting that some companies "do *billions* in business in a forum" without collecting sales taxes and that "*Quill*-shielded companies make up a large and expanding slice of retail"). South Dakota paints an entirely inaccurate picture. Online giants already are collecting and remitting sales taxes nationwide, so overruling *Quill* will not affect them; the burden of overruling *Quill* would fall instead on the small online businesses that South Dakota's brief entirely ignores. Many of those small businesses sell through Etsy, and Etsy survey data suggest that if *Quill* were overturned, the burden of interjurisdictional sales tax compliance would discourage small businesses from selling into the interstate market at all.

1. The larger online retailers include not only companies that largely eschew brick-and-mortar storefronts such as Amazon, but also "big box" companies that also have significant online presences, such as

Walmart or Target. And even Amazon has physical locations—fulfillment centers to facilitate same-day or next-day delivery—in many States. These companies *already* are collecting sales taxes in every State to which they sell online because, for the most part, they have a physical presence in every State and thus are not shielded from sales-tax collection obligations by *Quill*. Indeed, the GAO estimates that States already collect about "75 to 80 percent of the taxes that would be owed if all remote sellers were required to collect tax on all remote sales." U.S. Gov't Accountability Office, *Sales Taxes: States Could Gain Revenue From Expanded Authority, But Businesses Are Likely to Experience Compliance Costs* 8 (Nov. 2017) ("GAO Report"). The numbers are even higher for internet sales—the top 100 online retailers collect taxes on 87% to 96% of sales made. *Id.* at 41.

The fight over *Quill* is thus not principally about the larger online retailers. Instead, it principally concerns millions of far smaller businesses that lack the resources with which to address interjurisdictional sales tax collection obligations.

2. Small businesses, no less than companies such as Amazon, have recognized that an online presence is a modern business necessity and are adapting accordingly. As of 2017, 71% of small businesses in the United States had their own website, and 92% of small businesses planned to have a website by the end of 2018. Clutch, *Small Business Websites in 2017: Survey* (Mar. 14, 2017), https://clutch.co/web-designers/resources/small-business-2017-website-survey. Many of these companies operate local storefronts in their hometowns and use the internet to reach incrementally more customers in other cities or States. "Virtually all

retail conducted in the United States today is internet-enabled in some form or fashion"—"brick-and-mortar" has become "brick-and-click." Ike Brannon et al., *Internet Sales Taxes and the Discriminatory Burden on Remote Retailers—An Economic Analysis*, Mar. 15, 2018, at 7, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3140948. Other small businesses operate purely online.

For many of the smallest businesses, particularly microbusinesses, the prospect of reaching substantial volumes of customers through their own independent websites is both daunting and unrealistic. For such microbusinesses, online marketplaces such as that operated by Etsy perform a crucial role.

An online marketplace is "a technology platform that facilitates the sale of goods or services between a third-party seller and a customer." Bradley Ashby & Harley Duncan, *The Role of Online Marketplaces in the Collection of Transaction Taxes*, 26 J. Multistate Tax'n 8, 8 (June 2016). A transaction starts with sellers posting their products on the online marketplace's listings. A customer can then browse the marketplace, find a product, place an order with the seller, and transmit payment and shipping information through the marketplace. A seller receives the information and ships the purchased good to the buyer; the marketplace, in turn, remits payment to the seller, charging a small fee or portion of the sale for using the marketplace service.

Etsy is a global online marketplace that specializes in the sale of unique and creative goods, ranging from handcrafted pieces to vintage treasures. Its nearly two million active sellers use the online platform to market a tremendous variety of products. Some of the most popular items on Etsy include handcrafted home décor,

jewelry, accessories, and clothing, many of which are unique and can be purchased only from an Etsy seller. The type of goods available on Etsy can range from everyday items (such as handcrafted sandals and baby blankets) to intricate novelties (such as unicorn fluff and vintage 1960s midi dresses).[3]

Etsy sellers are not online giants. Etsy's most recent survey of those selling in its marketplace shows that 77% are businesses operated by a sole proprietor.[4] Eighty-seven percent of Etsy sellers are run by women entrepreneurs, and 97% of these businesses are based out of the sellers' homes.[5] Only 32% of Etsy sellers also have a traditional full-time job, and for nearly half of all Etsy sellers, their online businesses provide an important source of supplemental income, allowing them to "pay for necessary household expenses, including utility bills and rent."[6] In 2017, Etsy's 1.9 million businesses generated a total of $3.25 billion in gross merchandise sales.

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[3] *See, e.g.*, DimitrasWorkshop, *Leather Sandals "Cockatoo"*, https://www.etsy.com/listing/503572596/leather-sandals-handcrefted-sandals (last visited Apr. 3, 2018); RocailStudio, *Modern Baby Blanket in Pastel Mint Green*,https://www.etsy.com/listing/80806164/modern-baby-blanket-in-pastel-mint-green (last visited Apr. 3, 2018); DazzleMeGlitter, *Pink Unicorn Fluff*, https://www.etsy.com/listing/590607555/pink-unicorn-fluff-pink-iridescent (last visited Apr. 3, 2018); Vauxvintage, *Vintage 60s Black & Brown Striped Midi Dress*, https://www.etsy.com/listing/548119771/vintage-60s-black-brown-striped-midi (last visited Apr. 3, 2018).

[4] Etsy, *Crafting the Future of Work: The Big Impact of Microbusinesses* 5 (2017) ("Etsy Census"), *available at* https://extfiles.etsy.com/advocacy/Etsy_US_2017_SellerCensus.pdf.

[5] *Id.* at 4-5.

[6] *Id.* at 7.

3. Microbusinesses engaged in interstate retail sales, including those selling on Etsy and other online marketplaces, have relied on *Quill*'s bright-line rule as an essential safeguard for their business. Although the means by which businesses pitch their wares has changed over the years with the digital revolution, their reliance on *Quill* has not.

As microbusinesses, Etsy sellers lack the administrative and logistical resources available to larger entities. Indeed, Etsy sellers rank administrative burdens as one of their biggest challenges. On average, for every hour that an Etsy seller spends making or designing her products, she spends an additional hour dealing with various administrative tasks, such as business licensing, accounting, inventory management, or shipping.[7]

The administrative burden of addressing interjurisdictional sales tax compliance obligations would be devastating to the typical Etsy seller. Sales tax compliance requires more than just the automated collection or remittance of taxes. For a seller, the most arduous part of the process is often placing an item in the correct tax categories for each jurisdiction in which the product may be taxed. Those jurisdictions, in turn, may not use the same classifications—one State, for instance, may distinguish between shoes "primarily designed for athletic activity" and shoes that are not,[8]

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[7] *Id.* at 11.

[8] Connecticut, for example, distinguishes between the two for purposes of a sales tax holiday. *See* Conn. Agencies Regs. § 12-426-30 ("'Articles of footwear' do not include footwear primarily designed for athletic activity or protective use . . . ."); *see also* Conn. Dep't of Rev. Servs., *Annual One-Week Sales and Use Tax Exclusion for Clothing and Footwear Costing Less Than $100*,

while another State may treat both types of shoes as the same. *See infra* at 15-18 (outlining the obstacles that sellers face with interjurisdictional product classification).

Even with *Quill* in place, "[d]etermining how to handle tax-exempt sales, sales tax holidays, and product taxability coding can be a daunting task, particularly for small and midsize businesses. It has been estimated that sales tax exemptions account for 60 percent of the cost of compliance for small businesses." Cara Griffith, *Streamlining Versus "Amazon" Laws: The Remote Seller Dilemma*, 55 St. Tax Notes 351, 354 (2010). Layering sales tax compliance obligations for thousands of jurisdictions on top of existing tax compliance burdens could make an online business impossible for one person to manage. *See, e.g.*, Nancy Marshall-Genzer, *The Consequences of an Online Sales Tax*, Marketplace (Apr. 22, 2013, 12:24 PM), https://www.marketplace.org/2013/04/22/business/consequences-online-sales-tax (quoting a small business owner noting that "if he had to charge taxes for all 50 States, he'd have to hire someone just to handle taxes," and that "'this could be crushing'"). Indeed, while South Dakota portrays itself in this case as the champion of small businesses, it is the smallest businesses that would be hurt the most should *Quill* be overturned. GAO Report 15 ("[B]usinesses with limited experience in multistate tax collection and those that lack software systems designed to facilitate multistate tax collection would incur the highest costs. . . . [L]arger retailers that already collect in many states

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http://www.ct.gov/drs/cwp/view.asp?A=1510&Q=569278 (describing sales-tax-holiday exemption for "articles of clothing and footwear, as described in [§ 12-426-30]").

would already have the systems in place for collection under expanded authority.").

4. If *Quill* were overturned, Etsy survey information indicates that sellers might well avoid doing business with customers living in States that impose tax collection mandates on remote retailers. Etsy recently asked a sample group of sellers how they would respond to laws requiring the collection and remission of taxes on sales outside the sellers' home jurisdictions. Twenty-three percent of Etsy sellers surveyed stated that they would stop selling to places in which they would incur such an obligation; five percent of sellers said they would close their businesses altogether. South Dakota's tax on online sales by remote retailers thus will engender the very marketplace fragmentation against which the dormant Commerce Clause was intended to guard. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980) ("[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace.").

II. Quill's Fundamental Premise Remains Sound In The Era Of Online Commerce.

For the reasons given above, the Court should expect any impact from the abrogation of *Quill* to fall most heavily on smaller businesses, including microbusinesses selling through online marketplaces including Etsy, many of which may stop making interstate sales altogether. South Dakota argues that this drastic impact on the nation's most vulnerable entrepreneurs is justified because *Quill's* rationale for its bright-line rule has eroded with technological and legal changes. That proposition is entirely incorrect.

1. In *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), the Court held that a State may not impose a tax "upon a seller whose only connection with the customers in the State is by common carrier or the United States mail." *Id.* at 758. The Court arrived at this holding for two reasons—one rooted in due process, the other in the dormant Commerce Clause. First, the Court determined that to hold otherwise would allow "local jurisdictions with no legitimate claim to [] a fair share of the cost of the local government" to impose "a virtual welter of complicated obligations." *Id.* at 759. Those obligations included addressing "[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements." *Id.* Second, the Court reasoned that "[t]he very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements," for "Congress alone has the power of regulation and control." *Id.*

A quarter century later, this Court was asked to revisit *Bellas Hess*, which produced the decision in *Quill*. The North Dakota Supreme Court had held that *Bellas Hess* was no longer necessary given economic, technological, and legal developments. On the economic front, the state supreme court observed that the mail order business had experienced "remarkable growth" since the days of *Bellas Hess*, and that "advances in computer technology greatly eased the burden of compliance with a 'welter of complicated obligations' imposed by state and local taxing authorities." 504 U.S. at 303. The state supreme court also noted that the legal landscape had changed, explaining that this Court's minimum-contacts and dormant Commerce Clause jurisprudence gave it reason to believe *Bellas Hess* was no longer good law.

This Court disagreed. It noted that the bright-line rule still "further[ed] the ends of the dormant Commerce Clause" by setting forth "the demarcation of a discrete realm of commercial activity that is free from interstate taxation" and by creating a "safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or by United States mail.'" *Id.* at 315 (citation omitted). Whether the *Quill* Court would have adopted the bright-line rule of *Bellas Hess* in the first instance did not matter—*stare decisis* controlled. *Id.* at 311, 317. Because "a sizable industry" had developed a "substantial reliance" on the rule, the "interest in stability and orderly development of the law" underpinning *stare decisis* required that the bright-line rule remain in place. *Id.* at 317.

2. South Dakota makes the same argument that its neighbor to the north made in *Quill*: technology has evolved to the point where the bright-line physical presence rule is no longer necessary. *Compare* Pet. Br. 9-13, *with Quill*, 504 U.S. at 303, 313 & n.6 (noting argument that "advances in computer technology" greatly eased the burden of compliance with a "'welter of complicated obligations"). But despite the digital revolution, tax compliance is hardly "easy." Pet. Br. 13. While tax compliance software is doubtless better than it was at the time of *Quill*, the patchwork quilt of varying sales tax laws in thousands of jurisdictions remains. Modern tax compliance software does not have enough functionality to obviate the administrative burden that was the deciding concern for this Court in *Bellas Hess* and *Quill*. Indeed, the burden is multifaceted—it requires the mapping of thousands of tax codes (with their respective exceptions, exemptions, and holidays), the mapping of millions of unique products to those thousands of tax codes, and the overlay-

ing of matrices of exemptions tied to the status of sellers and buyers. Given this complexity, it is doubtful that a software fix *ever* can be developed.

South Dakota claims that tax collection is so seamlessly automated that "[r]ate calculation" at the point of sale is "now as easy as typing a shipping address into a search bar." Pet. Br. 45; *see also* Br. of Nat'l Ass'n of Certified Serv. Providers ("CSP Br.") 6-7 ("Simply put: no retailer needs to manually calculate or file sales tax, or to keep track of the peculiarities in any jurisdiction's tax laws."). That argument simplistically assumes that any given jurisdiction only has one tax rate that applies equally to all products for all purchasers for all purposes. The real world is far more complicated.

To begin, it is not the case that all jurisdictions have only a single tax rate that applies to all products equally. Classifying a product for just *one* jurisdiction can be a difficult and complicated process. It requires knowledge not only of the applicable statutes and regulations, but also interpretive guidance from courts and administrative agencies addressing similar fact patterns. A State can have hundreds of different product classifications, and that multiplicity is enough, standing alone, to make the first step of sales tax collection confusing even in that one State. The task of classification becomes impossible for a microbusiness when an Etsy seller must grapple with the sales tax laws of 44 other States and over 10,000 local jurisdictions. Tax collection software provides little help with classification; software providers caution that sellers alone are

responsible for ensuring accurate product classification and urge cautionary over-collection.[9]

Etsy's recent efforts to collect sales tax in the State of Washington illustrate the difficulties of classification. In July 2017, Washington enacted a law that requires remote sellers (*i.e.*, online sellers with no physical presence in Washington) and marketplace facilitators such as Etsy to collect and remit sales taxes, unless they instead provide written notice to consumers that the consumers owe sales taxes *and* then submit an annual report to each consumer detailing their purchases. Wash. Rev. Code §§ 82.08.053, 82.13.020. As a "marketplace facilitator" that handles more than $10,000 of gross sales in Washington for all Etsy sellers, Etsy made the choice to collect taxes for sales made in the State, regardless of whether an individual Etsy seller's sales in Washington exceed $10,000. *Id.* §§ 82.08.053(1)(a)(i), 82.08.053(2)(b), 82.13 010(3).

Etsy began complying with the law when it went into effect on January 1, 2018, and encountered classification problems at the outset. The sale of craft food items, for example, posed an immediate issue. Washington law exempts the sale of "food and food ingredients" from sales tax requirements. Wash. Rev. Code § 82.08.0293. Candy is an exempted food item and is defined as "a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces." Wash. Admin. Code

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[9] *See, e.g.*, Jennifer Dunn, *Sales Tax By State: Is Candy Taxable?*, TaxJar (Feb. 13, 2017), https://blog.taxjar.com/sales-tax-state-candy-taxable/ ("If you're unsure about how certain candy taxability sales tax rules apply to you, be sure to consult your state's department of revenue or a sales tax expert!").

§ 458-20-244(3)(e)(i). But any sweet preparation that includes flour is not considered "candy" under Washington law, nor is any sweet preparation that requires refrigeration. *Id.* § 458-20-244(3)(e)(ii). So a marshmallow pop would be considered "candy" and exempt from Washington's remote retail sales tax,[10] but a pecan pie bar from the same seller likely would not be, as the latter contains flour.[11] As Etsy is not the producer or seller of the goods on its platform, it has no way of making product classifications with certainty. Etsy can only classify an item with the information given by an Etsy seller in her listing, which could be incomplete or insufficient to make a determination of tax category from jurisdiction to jurisdiction. The end result of this uncertainty is that Etsy sellers may err on the side of collecting sales tax (collecting the higher of two tax rates if she is not certain which applies), which could lead to over-collection.

Washington is not the only State with complicated classification rules, and those rules do not overlap neatly across States. Some States, for example, will exempt sales of the American flag and their respective state flags from sales tax obligations.[12] But Massachusetts allows an exemption only for American flags,[13]

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[10] *See, e.g.*, indigojoneseats, *Heart Shaped Hot Chocolate Sticks with Homemade Marshmallows*, https://www.etsy.com/listing/219218916/heart-shaped-hot-chocolate-sticks-with (last visited Apr. 3, 2018).

[11] *See, e.g.*, indigojoneseats, *Pecan Pie Bars*, https://www.etsy.com/listing/239527518/pecan-pie-bars (last visited Apr. 3, 2018).

[12] *See, e.g.*, Conn. Gen. Stat. § 12-412(23); Fla. Stat. § 212.08(7); 72 Pa. Stat. § 7204(32).

[13] Mass. Gen. Laws ch. 64H, § 6(w).

California allows an exemption only for flags sold by nonprofit veterans groups,[14] and Virginia allows an exemption only for flags sold by government agencies.[15] Classifying a product as a "flag" for tax compliance purposes will not capture these nuanced differences in exemption laws. Neither Etsy nor any tax compliance software can make meticulous classification decisions for a microbusiness;[16] it will be nearly impossible to capture every classification, every exemption, and every judicial or administrative interpretation of every exemption in every taxing jurisdiction across the country. The permutations would be difficult to quantify and manage for any business, never mind a microbusiness. And treating products with a broad brush, as tax compliance software does now, is no answer to this problem, as it raises the risk of over-collection. Over-collection is understandably no problem for South Dakota, but it is unfair to consumers and merchants alike. Indeed, over-collection potentially exposes cautious merchants to the prospect of litigation. State laws like South Dakota's already give consumers who may have been inadvertently overcharged the option of pursuing a lawsuit to recover an overcharge. *E.g.*, S.D. Codified Laws § 10-59-24.1.

Classifying products and determining the exemptions associated with certain classifications are not the only challenges that modern technology cannot over-

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[14] Cal. Rev. & Tax Code § 6359.3.

[15] Va. Code § 58.1-609.1.

[16] TaxJar, for example, has only 17 broad exemption categories based on a product's classification. TaxJar, Sales Tax API, https://developers.taxjar.com/api/reference/#introduction (last visited Apr. 3, 2018). One of those categories is a catchall "other exempt" classification.

come. Many States exempt transactions from sales tax obligations based on the status of the *buyer*. In certain States, for example, 501(c)(3) nonprofit organizations are exempted from paying sales taxes.[17] A buyer's eligibility for an exemption also may turn on factors other than the buyer's identity. Any buyer may be exempt from sales tax if the purchased item will be used to manufacture another item,[18] the item will be resold,[19] or the item will be used in certain types of construction.[20] But neither Etsy nor any third-party tax compliance software is capable of collecting this information automatically; rather, a microbusiness must handle such exemptions on a case-by-case basis. While that administrative burden may be (barely) manageable for a microbusiness's home State, it would become impossible if a microbusiness had to account for every state and local taxing jurisdiction's particular rules.

There are other reasons why the purported technological wizardry of tax compliance software does not obviate the need for *Quill's* bright-line exemption. For

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[17] *E.g.*, Ohio Rev. Code § 5739.02(A)(9)(a).

[18] *E.g.*, Tex. Comptroller of Pub. Accounts, Publication No. 94-124, *Manufacturing Exemptions* (Apr. 2003), *available at* https://comptroller.texas.gov/taxes/publications/94-124.php ("State sales and use tax exemptions are available to taxpayers who manufacture, fabricate or process tangible personal property for sale.").

[19] *E.g.*, Wash. Admin. Code § 458-20-102.

[20] *E.g.*, Mass. Gen. Laws ch. 64H, § 6(f) (exempting "building materials and supplies to be used in the construction, reconstruction, alteration, remodeling or repair" of, *inter alia*, buildings owned by governmental agencies or nonprofit entities and buildings located in a Marine Industrial Park "exclusively used for agricultural production or seafood processing").

example, even the identification of the taxing jurisdiction can prove to be a challenge. Many tax programs use ZIP codes to set tax rates;[21] a seller types in a ZIP code (or a range of ZIP codes) and manually sets a tax rate for those ZIP codes, under the assumption that those ZIP codes are part of the same local taxing jurisdiction. (For some platforms, the ZIP code is automatically keyed to a local taxing jurisdiction's rate.) But neighboring jurisdictions often share ZIP codes; one part of the ZIP code area may be in a taxing jurisdiction, while another may not. Consider the 57717 ZIP code. Most of the ZIP code covers the area around Belle Fourche, South Dakota. But the ZIP code actually covers three different States (Montana, South Dakota, Wyoming), and six different counties. While South Dakota and Wyoming have sales taxes, Montana does not. The software may be incapable of detecting multiple local rates for one area and may instead default to the rate for South Dakota, the predominant jurisdiction.

3. South Dakota asserts that the Streamlined Sales and Use Tax Agreement ("Streamlined Agreement") has reduced interjurisdictional differences in sales tax laws and that it "substantially simplif[ies] . . . sales-tax compliance systems and processes." Pet. Br. 13; Streamlined Sales Tax Governing Board Br. 1. But the Streamlined Agreement suffers from several flaws that prevent it from eliminating the need for *Quill*.

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[21] *See, e.g.*, Etsy, *Adding Sales Tax to Listings*, https://www.etsy.com/help/article/331 (last visited Apr. 3, 2018) ("If you do need to charge tax, sellers located in the United States can use the sales tax tool to specify a tax rate for each US state (by state, zip code, or range of zip codes).").

To begin, despite its name, the Streamlined Agreement is not truly "streamlined." While the Agreement's signatories have attempted to harmonize several sales tax provisions, "there still is a significant lack of uniformity among even SSUTA member States relating to the application of sales/use taxes in many areas." Peter G. Stathopoulos, *State Taxation of Remote Sellers: Has the Physical Presence Nexus Test Been Rendered Obsolete?* 23 J. Multistate Tax'n 22, 47 (Aug. 2013). Because the Agreement requires only "substantial compliance," member States can deviate from provisions they simply do not like. *See id.* (describing Georgia's decision to "decouple[] . . . from the SSUTA resale exemption certificate provisions"); Joseph Bishop-Henchman, Tax Found., *Testimony Before Maryland Legislature on the Streamlined Sales Tax Project*, (Feb. 18, 2009), https://taxfoundation.org/testimony-maryland-legislature-streamlined-sales-tax-project/ (explaining that, while the Agreement had a requirement for a uniform clothing tax rate, the Streamlined Sales Tax Project abided by Minnesota's decision to charge a separate tax for fur sales).

Even assuming a microbusiness can familiarize itself with the Streamlined Agreement's provisions, there is no guarantee that it will be compliant with the laws of the Agreement's signatories; indeed, at a minimum, that business must navigate through a complicated "taxability matrix" for each member State with several hundred rows of comparative data to determine whether a particular signatory's law is harmonized with the Streamlined Agreement.[22]

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[22] *See* Streamlined Sales Tax Governing Board, Inc., *Taxability Matrix*, http://www.streamlinedsalestax.org/otm/ (last visited Apr. 3, 2018).

Moreover, the Streamlined Agreement lacks buy-in from most of the country. While 24 States are signatories to the Agreement, the five most populated States—California, Texas, Florida, New York, and Pennsylvania—are not. An agreement that is meant to provide a cross-border solution cannot be effective if it does not address two-thirds of the American population.

4. South Dakota may suggest that the burden of tax collection simply can be transferred from microbusiness sellers to the marketplace operators used by those sellers, such as Etsy. Some States already have taken partial steps in that direction; as discussed above, Washington puts marketplace operators to the choice of either collecting sales taxes for their sellers or providing onerous annual reports of purchases to marketplace customers. *Supra* at 15.

Shifting the sales tax collection burden from sellers to marketplace operators is neither feasible nor fair. As an initial matter, shifting the collection burden to marketplace operators would hardly address the problem for all microbusinesses, as not all microbusinesses sell through a third-party online marketplace. Moreover, to the extent States such as South Dakota base a seller's sales tax collection and reporting obligations on whether the seller's sales volume into a State exceeds a particular threshold, marketplace operators cannot reliably enforce those thresholds because microbusinesses often sell their goods on multiple platforms. "The majority (58%) of Etsy sellers [in the United States] promote or sell their goods in other venues." Etsy Census at 8. Etsy has no way of tapping into information about a particular seller's sales through other channels. And even if it did, the burden of reviewing outside sales activity for 1.9 million sellers—Etsy's seller

base as of December 31, 2017—would be overwhelming even for an established marketplace operator.

Finally, and most importantly, there is no practicable way for even a single business to ensure that it is accurately classifying its products in accordance with the laws of thousands of jurisdictions (and to account for the jurisdictions' varying exemptions for certain purchasers and for certain uses). Doing so often requires detailed knowledge of a product's characteristics—for example, whether a food product contains flour, or if a customer purchases a dog collar meant for a guide dog.[23] *Supra* at 15-18. Requiring a marketplace operator to master such information for millions of sellers, selling tens of millions of products, in order to ensure each seller's compliance with thousands of jurisdictions' tax codes, is entirely unrealistic.

5. All told, the imposition of sales taxes on remote retail transactions will only drive small businesses away from the interstate market. The decision to leave the market would be understandable given that a seller would be subjected to significant financial and regulatory obligations, bearing potential civil and criminal liability for non-compliance, over which it has zero input or influence. A craft jeweler in New York will have no effective way of protesting a South Dakota legislator's proposal to take the current law a step further by lowering the collection threshold from $100,000 to $50 and 200 transactions to a single transaction.

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[23] *See, e.g.*, Miasclosetshop, *Midnight in the Meadow Dog Collar*, https://www.etsy.com/listing/589385504/midnight-in-the-meadow-dog-collar-dark (last visited Apr. 3, 2018); *see also* N.Y. Tax Law § 1115(s) (exempting "the sale of any good or service necessary for the . . . maintenance of a guide dog" from sales tax requirements).

And the burden goes beyond mere collection. Once exposed to a State's taxation requirements, a seller must not only report and remit taxes, it must also respond to information requests, remain vigilant about continued compliance with the ever-changing requirements of state and local law, and defend itself from regulatory and judicial scrutiny in the form of audits and enforcement actions. But a microbusiness subjected to such scrutiny is unlikely to have the resources necessary to mount a defense over an audit or a dispute and therefore is much more likely to bow immediately to governmental pressure. *See* GAO Report 23 (smaller remote retail businesses are likely to "pay or comply without thoroughly examining the strength of their legal position"). A foreign legislature unaccountable to those adversely affected by its laws should not be able to place such drastic impositions on those who lack "powerful safeguards against legislative abuse." *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981).

III. Quill's Fate Should Not Turn On The Specifics Of South Dakota's Law.

In part, South Dakota seeks to turn the question of *Quill's* fate into a referendum on the State's specific law, urging that its law should be permitted to survive dormant Commerce Clause review because it offers "ample safe harbors" for businesses making only marginal sales into the State. Pet Br. 23. The Court should not heed the State's siren-song call to abandon *Quill*'s bright-line rule in favor of case-by-case review.

1. To begin, South Dakota's insistence that its safe harbor provisions ensure that out-of-state businesses with only minor sales volume in the State will not be saddled with onerous sales tax collection obligations

blinks reality. The South Dakota law is triggered *either* by $100,000 of gross receipts *or* 200 transactions in the State in a year. Pet. Br. 23. While few microbusinesses will cross the dollar-value threshold and sell $100,000 of goods in South Dakota, 200 sales is a realistic possibility. On Etsy, several popular items (such as accessories and craft supplies) are sold for less than a dollar. A seller could thus do far less than $100,000 of business in South Dakota while still triggering a collection obligation.

The thresholds also are misleading because any seller that merely *might* exceed the threshold will feel compelled to collect sales taxes. A seller must collect sales taxes if it crosses the threshold of 200 transactions or $100,000 of gross receipts either in the previous year or in the *current* year. Pet. App. 19a. It is unclear how a seller is expected to ensure compliance with an obligation triggered by sales volume in the *current*-year. Practically speaking, a business that expects to sell more than a *de minimis* number of goods in South Dakota would need to collect sales taxes prophylactically beginning with sale one because of the *possibility* that later sales might trigger the collection requirement. A business that fails to collect the tax from early purchasers, and then later exceeds the threshold, presumably itself will be on the hook for remitting the amounts owed or be in violation of the law.

Finally, South Dakota has identified no principle that would make a 200-sale threshold constitutional there, but unconstitutional in a far larger State such as California or Texas. Transaction-based thresholds for sales tax obligations therefore may not offer much protection to microbusinesses at all, should they be adopted in other States.

2. States have expressed no reluctance in exercising their taxation power over those outside their borders. A number of States have enacted laws like South Dakota's, imposing taxes on out-of-state retailers despite the fact that *Quill* currently is in force.[24] Some of those laws have been in effect for some time; if this Court overturns *Quill*, there is every reason to think that States with such laws will seek to enforce them all the way back to the date they were enacted. And other States are eager to join the fray. In 2017 alone, legislators in 31 States proposed 80 bills concerning the collection of sales tax for interjurisdictional sales; many of these proposed laws specifically targeted marketplace sellers.[25]

It is not difficult to foresee States testing the boundaries of the dormant Commerce Clause in a *Quill*-less world. South Dakota's threshold requirements—200 transactions or $100,000—are enough to impose an onerous burden on many microbusinesses offering remote retail, but they are by no means the floor. Other States, such as Idaho, Pennsylvania, and Washington, already have lower monetary thresholds ($10,000), and there is no reason to be confident that States will stop there.[26] South Dakota has proposed no

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[24] *See, e.g.*, Ind. Code § 6-2.5-2.1; N.D. Cent. Code § 57-39.2-02.2; Wyo. Stat. § 39-15-501.

[25] Liz Malm et al., *Sales and Use Tax Compliance Legislation was a Big State Tax Trend This Year*, Multistate Insider, July 11, 2017, https://www.multistate.us/blog/sales-and-use-tax-compliance-legislation-july2017 (last visited Apr. 3, 2018).

[26] 72 Pa. Stat. § 7213.1(a); Wash. Rev. Code § 82.08.053(2)(a). On March 22, 2018, Idaho enacted into law H.B. 578, which imposes the $10,000 floor. The text of H.B. 578 can be found at https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2018/legislation/H0578.pdf.

principled basis to distinguish, for purpose of the dormant Commerce Clause, between its own threshold requirements and lower ones—there is no reason why a threshold of $100,000 would be constitutional, whereas a threshold of $10,000 or $1,000 would not be. Overturning *Quill* on the basis that South Dakota's thresholds are reasonable will thus touch off an avalanche of litigation over the constitutionality of ever lower thresholds. That is precisely the type of line-drawing that should be left to Congress, not the judiciary.

IV. Stare Decisis Requires Maintaining Quill's Bright-Line Rule.

Quill's bottom-line rule has stood for over half a century, with its *stare decisis* effect reaffirmed more than two decades ago. There is no doubt that microbusinesses have relied on *Quill*'s bright-line rule. While sales tax compliance software has evolved since 1992, that compliance software still does not provide an adequate solution to the immense burden of administering sales taxes for 45 States, the District of Columbia, and over 10,000 local jurisdictions. Despite the appearance of progress through technological revolution, little has changed since *Quill*—*Quill* continues to "engender[] substantial reliance" and is "part of the basic framework of a sizable industry," 504 U.S. at 317; uprooting *Quill* would impose a "welter of complicated obligations," *Bellas Hess*, 386 U.S. at 759-60.

Overturning *Quill* would cause substantial disruption to the online marketplace, and the harm would be felt most acutely by those who are least able to afford it: small businesses and microbusinesses who rely on marketplaces like Etsy. *See* GAO Report 22 (costs of satisfying multiple sales tax obligations will be at its

highest for "businesses that do not have established legal teams, software systems, or outside counsel to assist with compliance related questions").

That harm only will be amplified if States choose to enforce their existing sales tax laws retroactively. While South Dakota has chosen to tax remote retailers prospectively, nothing prevents another State from looking back, citing sales tax regimes already in place whose enforcement is limited by *Quill*. In fact, 41 States, two U.S. Territories, and the District of Columbia have hinted to this Court that sales taxes will be assessed retroactively in *Quill*'s absence. Br. of Colorado et al. 19. The amici States argue that retroactive application will be tempered by "regulations or other administrative guidance," *id.*, but such an assurance provides little comfort to microbusinesses, especially in light of the fact that several of the State amici have already begun taxing businesses retroactively, Respondents' Br. 63-64. Although it is feasible in theory for a business to fight retroactive collection, in practice microbusinesses do not have the resources to engage in such a fight. *See* GAO Report 23. The Court should therefore reaffirm *Quill* for the same reasons cited in that decision: "[t]he 'interest in stability and orderly development of the law' that undergirds the doctrine of *stare decisis* . . . counsels adherence to settled precedent." 504 U.S. at 317.

Moreover, *stare decisis* applies with "enhanced force" when those unhappy with a ruling of this Court "can take their objections across the street," so that "Congress can correct any mistakes it sees." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Indeed, the Court indicated in *Quill* that the bright-line rule should remain intact until Congress had an oppor-

tunity to address interjurisdictional sales taxation. It recognized that Congress was best positioned to determine the "thorny questions" that might arise if the bright-line rule were upended, and that Congress alone had the power to "protect interstate commerce from intolerable or even undesirable burdens." *Quill*, 504 U.S. at 318 & n.10.

Congress has studied this issue closely since *Quill*. There is little doubt that the adverse impact of interjurisdictional taxation on smaller businesses has been at the forefront of Congress's deliberations. *E.g.*, *Internet Tax Issues: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 106th Cong. 15 (2000) (testimony of Erick Gustafson, Director, Citizens for a Sound Economy) (testifying that "if taxes were applied to on-line sales," growth for small businesses in the "new technology sector would be slowed by 24 percent"). In the last five years alone, members of Congress have proposed at least five bills that address remote retail sales over the internet. These bills attempt to balance issues concerning the benefit to state coffers, the burden imposed on remote retailers, and the feasibility of an interjurisdictional sales taxation scheme in different ways.[27] Although the bills are not perfect, they represent Congress's continued deliberation of this issue.

This Court should not preempt Congress's careful contemplation. As *Quill* recognized, this Court's consideration of a single sales tax regime is no substitute

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[27] For example, the Marketplace Fairness Act, introduced three times over the last five years, would exempt any seller whose gross annual receipts do not exceed $1 million. H.R. 684, 113th Cong. (2013); S. 698, 114th Cong. (2015); S. 976, 115th Cong. (2017).

for Congress's expertise and exercise of judgment. 504 U.S. at 318 ("[T]he underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve."). If South Dakota's remote retail tax scheme is allowed to stand, it only will invite other legislatures to pass more onerous legislation to test the limits of the dormant Commerce Clause, which will in turn only spur more litigation about the exact contours of what the Clause allows. In the meantime, microbusinesses such as those selling on Etsy will be needlessly discouraged from participating in the interstate economy.

CONCLUSION

The judgment of the Supreme Court of South Dakota should be affirmed.

Respectfully submitted.

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